

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1198 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements? No.
  2. To be referred to the Reporter or not? No. :
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement? No.
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No.
  5. Whether it is to be circulated to the Civil Judge? : NO  
No.

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KHIMJIBHAI KHODABHAI ZALA

Versus

AHMEDBHAI LATIFBHAI MEMON  
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Appearance:

MR YOGESH S LAKHANI for Petitioner  
MS KHYATI P HATHI for Respondent No. 1  
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CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 30/08/2000

ORAL JUDGEMENT

The respondent filed the civil suit for declaration and permanent injunction and also filed an application exh. 5 for interim injunction. The trial Court has not believed the possession of the defendant petitioner on the date of filing of the suit and hence the trial Court granted temporary injunction against the

defendant.

2. The petitioner filed Civil Misc. Appeal No. 63/97 before the District Court, Bhavnagar against the order passed by the trial Court granting interim injunction against the defendant. During the pendency of the application exh. 5 before the appellate Court the respondent filed an application exh. 11 for withdrawal of the suit and during pendency of the Appeal the petitioner defendant filed an application exh. 12 for restoration of the possession of the suit property. The appellate Court allowed the application exh. 11 permitting the plaintiff - respondent to withdraw the suit and also dismissed the application exh. 12 of the petitioner. This order dated 31-7-1997 passed by the Jt. District Judge, Bhavnagar has been challenged in this revision application before this Court.

3. The contention of the learned counsel for the petitioner is that the defendant - petitioner was in possession of the disputed property on the basis of the agreement to sell executed by the plaintiff's predecessor-in-title and he was in possession for more than 32 years. The Trial Court erred in granting injunction in favour of the respondent and the lower appellate Court has also committed an error on the face of the record in permitting the plaintiff to withdraw the suit. It is also submitted by the learned counsel for the petitioner that the appellate Court has no jurisdiction to allow the purses exh. 11 for withdrawal of the suit particularly when purses exh. 11 was filed before the trial Court. At the most the Appellate Court could have remanded the matter to the trial Court and the trial Court could have permitted the plaintiff respondent to withdraw the suit.

4. Heard the learned counsel for the parties and perused the material on record.

5. It appears that the application exh. 11 was filed by the plaintiff before the trial Court and when the appeal was filed by the petitioner before the Appellate Court the records of the civil suit was summoned from the trial Court by the Appellate Court where pursis exh.11 came along with record and after considering merits of the case the appellate Court allowed the application exh.11 and the plaintiff respondent was permitted to withdraw the suit. As the purses exh. 11 was pending before the trial Court, the defendant filed an application exh. 12 before appellate Court for restoration of possession of the property in

dispute on the ground that he was in possession as a result of agreement to sell executed by the father of the plaintiff since last 32 years and he was dispossessed on the basis of the interim injunction granted by the trial Court in favour of the plaintiff respondent and hence the possession should be restored to him.

6. The appellate Court has considered the material on record and came to the conclusion that the defendant petitioner was not in possession of the property in dispute on the date of filing of the suit. If the possession is taken by the defendant after filing of the suit, the the defendant could have filed the suit for recovering the possession as per the provisions of Section 6 of the Specific Reliefs Act. But he has not done so. Meaning thereby is that the defendant was not in possession of the property in dispute on the date of filing of the suit. The provisions of Order 23 Rule 1 of the CPC permit the plaintiff to withdraw or abandon the suit or part of his claim at any time after institution of the suit. He can be allowed to withdraw the suit with the condition or without any condition. If the plaintiff is permitted to withdraw the suit on the condition then he can be permitted to file a fresh suit. In case, the suit is permitted to be withdrawn without any condition then he cannot file a fresh suit in respect of the same cause of action. As such, before the trial Court or any other Court the suit proceedings are pending, the plaintiff can be permitted to withdraw the suit. As in the present the record of the suit has already been summoned by the Appellate Court and the same was there the appellate Court was itself empowered to permit the plaintiff to withdraw the suit proceedings. As such, the lower appellate Court was fully justified in permitting the plaintiff to withdraw the suit even at the appellate stage, where the suit proceedings were pending and the record of the suit proceedings was there and the plaintiff was permitted to withdraw the suit at that stage. The petitioner raised the objection regarding the withdrawal of the suit by filing the application exh. 12.

7. After going through the material on record, the appellate Court was justified in rejecting the application exh. 12 regarding the objection and restoration of the possession of the property in dispute.

8. I do not find any good ground calling for interference by this Court in revisional jurisdiction u/s 115 of the CPC. Accordingly, this Revision Application is dismissed. Rule is discharged, with no order as to costs. Interim relief has already been vacated by the

trial Court and the cost has also been awarded to the  
defendant - petitioner.

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